Daewoo Engineering & Construction Co Ltd v The Titular Roman Catholic Archibishop of Kuala Lumpur

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO D8-22-142 OF 2001
ABDUL WAHAB SAID AHMAD JC
6 JULY 2004

Contract — Performance bond — Bank guarantee — Plaintiff obtained interlocutory injunction to prevent calling on bank guarantee — Whether allowed where terms of guarantee reduced in form of letter

Civil procedure — Interlocutory injunction – Dispute on amount of damages — Whether triable issues exist

Civil procedure — Interlocutory injunction — Restraint on calling of bank guarantee – Balance of convenience — Where the balance lies

The plaintiff applied for an interlocutory injunction to restrain the defendant from calling on a guarantee issued by RHB Bank Bhd. The guarantee was originally given by DCB Bank Bhd on 19 April 1996 and extended until 24 December 1999. The validity of the guarantee by RHB Bhd expired on 31 December 2000.

This guarantee is one of the conditions imposed by the defendant on the Plaintiff in consenting to the installation of ground anchors on the defendant's land (Lot 97) which is adjacent to the Plaza Rakyat Project which was being constructed by the Plaintiff as the contractor for Plaza Rakyat Sdn Bhd.

A meeting was held between the parties on 3 April 1996 and the terms agreed were reduced to writing on 29 May 1996 in the form of a letter from the Plaintiff to the defendant where the defendant acknowledged acceptance of the terms and conditions of the guarantee.

Held, granting judgment to the plaintiff:

(1) It was pursuant to the agreed terms in the letter that the Letter of Guarantee was issued and therefore any demand on the guarantee must be in compliance with the terms of that agreement (see para 22).

(2) Even if the defendant had shown through correspondence that the amount of damages at RM318,700 as at December 1999 was not objected to by the Plaintiff, the actual call here was for a sum of RM1,328,025 which amount was computed without regard to the terms and factors as agreed in the agreement .These are clearly bona fide triable issues for the Court to decide (see paras 24 and 25).

(3) In determining where the justice of the case lies, the Court is satisfied that the defendant would not suffer irreparable damage which could not be compensated by the undertaking for damages by the Plaintiff. Pending the hearing, the amount is with the bank and the interest of the defendant to the sum of RM1 million, if at all, is secured and the status quo is maintained (see para 26).

A [**Bahasa Malaysia summary**

Plaintif memohon untuk injunksi interlokutori untuk menahan defendan dari memanggil jaminan bank yang dikeluarkan oleh RHB bank. Jaminan tersebut asalnya diberi oleh DCB bank pada 19 April 1996 dan dilanjutkan tempohnya sehingga 24 Disember 1999. Jaminan oleh RHB bank tamat
B tempohnya pada 31 Disember 2000. Jaminan ini adalah satu daripada syarat yang dikenakan oleh defendan terhadap palintif untuk membenarkan plaintif memasang sauh tanah di atas tanah defendan (Lot 97) yang bersebelahan kepada projek Plaza Rakyat yang dibina oleh Plaintif sebagai kontraktor bagi Plaza Rakyat Sdn.Bhd.

C Satu mesyuarat telah diadakan diantara kedua-dua pihak pada 3 April 1996 dan syarat yang telah dipersetujui telah ditulis pada 29 Mei 1996 dalam bentuk sepucuk surat daripada plaintif kepada defendan dimana defendan mengakui penerimaan syarat-syarat jaminan tersebut.

Diputuskan, memberi penghakiman kepada plaintif:

D (1) Ia adalah mengikut syarat-syarat yang dipersetujui di dalam surat tersebut, jaminan tersebut dikeluarkan dan atas sebab itu sebarang tuntutan terhadap jaminan tersebut haruslah mematuhi syarat-syarat di dalam perjanjian tersebut (lihat perenggan 22).

(2) Walaupun defendan telah membuktikan melalui surat-menyurat
E bahawa gantirugi adalah RM318,700 sehingga Disember 1999 tidak dibantah oleh plaintif, pemanggilan yang asal di sini adalah untuk RM1,328,025, jumlah wang yang dikira tanpa mengambil kira apa yang telah dipersetujui di dalam perjanjian tersebut. Ini adalah isu bona fide yang dipertikaikan untuk diputuskan oleh mahkamah (lihat perenggan 24 dan 25).

F (3) Di dalam memutuskan keadilan kes, didapati bahawa defendan tidak akan menderita dengan gantirugi yang tidak boleh dipampas oleh akujanji yang diberi oleh plaintif. Sementara menunggu perbicaraan, wang tersebut ada dengan bank dan kepentingan plaintif terhadap RM1 juta, jika ada, adalah dijamin dan keadaan sekarang harus kekal
G (lihat perenggan 26).]

Notes

For cases on interlocutory injunctions, see 2(2) *Mallal's Digest* (4th Ed, 2001 Reissue) paras 2707–2794

H For cases on performance bonds generally, see 3(2) *Mallal's Digest* (4th Ed, 2000 Reissue) paras 3425–3441.

Cases referred to

Keat Gerald Francis Noel John v Mohd Noor Abdullah [1995] 1 MLJ 193
I (folld)

Kerajaan Malaysia v South East Asia Insurance Bhd [2000] 3 CLJ 705 (refd)

Teknik Cekap Sdn Bhd v Public Bank Bhd [1995] 3 MLJ 449(refd)

K Nayagam (Skrine) for the plaintiff
Barry Goh (Iza Ng Yeoh & Kit) for the defendants

Abdul Wahab Said Ahmad JC:

[1] The Plaintiff applied for an interlocutory injunction vide summons in chambers enclosure 4 to restrain the defendant from calling on a guarantee issued by RHB Bank Bhd. The guarantee was originally given by DCB Bank Bhd on 19 April 1996 and extended until 24 December 1999. The validity of the guarantee by RHB Bhd expired on 31 December 2000.

[2] This guarantee is one of the conditions imposed by the defendant on the Plaintiff in consenting to the installation of ground anchors on the defendant's land (Lot 97) which is adjacent to the Plaza Rakyat Project which was being constructed by the Plaintiff as the contractor for Plaza Rakyat Sdn Bhd.

[3] A meeting was held between the parties on 3 April 1996 and the terms agreed were reduced into writing on 29 Mei 1996 in the form of a letter from the Plaintiff to the defendant where the defendant acknowledged acceptance of the terms and conditions of the guarantee.

[4] As the terms as agreed in the letter are relevant and necessary for the determination of this application, it is reproduced in extenso.

DAEWOO
DAEWOO CORPORATION

LOT 225, JALAN ROBERTSON, OFF JALAN PUDU, 50150
KUALA LUMPUR MALAYSIA
TEL. 03-2041700, 2041701, 2041702 & 2401703
FAX: 03-2041800

The Titular Roman Catholic Archbishop
Secretariat Uskup Agong Kuala Lumpur
528, Jalan Bukit Nanas
50250 Kuala Lumpur

Dear Sirs,

Re: Ground Achoring at St. Anthony's Church in Lot 97B

We, Daewoo Corporation of Lot 225, Jalan Robertson, Off Jalan Pudu, 50150 Kuala Lumpur, Malaysia, hereby agree to furnish you with a Bank Guarantee for the sum of RM 1,000,000.00 (Ringgit One Million Only) payable on demand subject to the following conditions stated herein in the event of damage arising to St. Anthony's Church and/or the School at Lot 97 as a result of such damage being caused by the execution of construction works at the Plaza Rakyat Project.

A Upon such damage becoming apparent, you shall notify us of the nature and extent of the damage whereupon both yourself and Daewoo Corporation shall mutually agree to the cause of damage, rectification works necessary, timing of such rectification works and the estimated cost. In the event that Daewoo Corporation fail to undertake the repairs or complete the repairs to the agreed standard, you can demand payment from DCB Bank under the form of Bank Guarantee issued in your favour.

B Prior to such demand, you must inform Daewoo Corporation by written notice of your intention to claim against the Bank Guarantee not later than 14 (fourteen) days before the date of the aforesaid demand. The amount demanded must not exceed the amount estimated by your engineer/valuer.

C Provided always that the total amount claimed, either singularly or severally, must not exceed One Million Ringgit. Upon payment of any partial amount the Bank Guarantee will be reduced by that same proportion. Provided further that in the event the claim under the Bank Guarantee is exhausted and the damage and loss suffered by you exceeds RM 1,000,000.00 you reserve your rights to claim against us or Plaza Rakyat Sdn Bhd or both of us.

D The total duration of the Bank Guarantee shall be till the period of one year after the Daewoo Corporation obtains 'the Certificate of Final Completion' (hereinafter called the 'CF') of the abovementioned Project. In spite that the Bank Guarantee stipulate the validity until 31st December 1999, if we obtain the CF earlier or later than 31st December 1998, the validity of the Bank Guarantee shall be deemed to be valid until one year from the date when the CF is issued and/or the Bank Guarantee shall be amended accordingly.

E

F If and when any damages are caused against the abovementioned St. Anthony's Church and the School, as one of criteria to judge under what condition the Church and the School were before such damages are caused, we shall use the 'Dilapidation Survey Report' Ref No. 1040/95/08/01 made by Toplis and Harding (M) Sdn Bhd. of Box No 35, 10th Floor, Menara TR, Jalan 52/4, 46200 Petaling Jaya, Selangor Darul Ehsan, on 13th March 1995.

Only upon the express agreement of both parties shall the Bank Guarantee be terminated prior to its stipulated expiry date whereupon you shall return the original copy to Daewoo Corporation for cancellation.

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Yours faithfully,	We, the undersigned, hereby accept the abovementioned terms and condition
- signed –	- signed –
.....	.....
H Choun Ho, Yoon Director	Name: The Titular Roman Catholic Archbishop of Kuala Lumpur Date: 29 MAY 1996

I HEAD OFFICE: 541, 5-GA, NAMDAEMUNNO, CHUNG-GU, SEOUL, KOREA C.P. BOX 2810, 825\69, SEOUL, KOREA/TELEX: DAEWOO K23341-2, K24444, K24295 CABLE: 'DAEWOO' SEOUL/TEL: 759-2114/FAX: 753-9489, 759-3368/3329, 759-3313

[5] Pursuant to this agreement, on 19 June 1996 a Letter of Guarantee (No. 70068603482) was issued in favour of the defendant by DCB Bank Bhd. Terms and conditions of the said Guarantee were *inter alia as* follows:

i. That in consideration of the Plaintiff agreeing to allow Plaza Rakyat Sdn Bhd and/or Daewoo to ground-anchor into Lot 97, the Bank agreed to pay to the defendant a sum of up to RM1,000,000 in the event of damage to Lot 97.

ii. That the said sum of up to RM1,000,000 was payable on demand notwithstanding any dispute or protest from Plaza Rakyat Sdn Bhd or the Plaintiff.

iii. That the validity period of the Guarantee was from 19 April 1996 to 31 December 1999.

iv. That any demand upon the Guarantee must be made within the validity period or within 30 days of the expiry of the validity period.

[6] The project was however delayed and towards the end of 1999, the defendant reminded the Plaintiff to renew the Guarantee, threatening to make a call on it. By letter dated 14 December 1999, the defendant through their solicitors, purported to give notice of demand on the Guarantee. On 24 December 1999, RHB Bank wrote to the defendant informing them that the Guarantee was extended to 31 December 2000.

[7] By letters 31 December 1999 and 27 January 2000, the defendant through their solicitors informed the Plaintiff of a purported condition of its acceptance of the renewal of the Guarantee that *inter alia,* 'the requirement for the report and estimate of engineer/valuer before demand or claim on Bank Guarantee dispensed with.' The Plaintiff, however, by letter dated 31 January 2000 replied that this condition was not acceptable. Further, by letters dated 6 November 2000 and 30 November 2000, the defendant's solicitors informed the Plaintiff that a call would be made on the Guarantee unless it was renewed. By letter dated 12 January 2001, the defendant's solicitors forwarded a copy of the Damage Assessment Report and intimated that their client shall call on the bank guarantee accordingly.

[8] The Plaintiff contends that the call was wrongful and in breach of the written agreement and the Guarantee in that:

i. The defendant had failed to give the Plaintiff an opportunity to agree on the alleged cause of the damage, the proposed rectification and the estimated cost.

ii. The defendant had failed to give notice of its demand on the Guarantee.

iii. Damages, as in the report by the defendant's consultant, were not properly recoverable under the terms of the Guarantee as it failed to make reference to the Toplis Harding Dilapidation Survey Report in assessing the alleged damages.

[9] In its Statement of Claim, the Plaintiff prayed for Declaratory Orders amongst which was one that the call on the Guarantee pertained to damages caused by the construction of Plaza Rakyat and not for any other reason. Since the call on the Guarantee is not valid, the defendant is estopped from accepting the amount under the said guarantee from RHB.

[10] In dealing with this application, the guidelines as enunciated in *Keat Gerald Francis Noel John v Mohd Noor Abdullah* [1995] 1 MLJ 193 were followed.

Bona fide Serious Issues to be Tried

[11] The Plaintiff contended that there are serious issues to be tried as follows:

i. The defendant had not given the Plaintiff any opportunity or adequate opportunity to agree on the existence and causation of the alleged damage and the remedial works to be done, costs of these works, and given an opportunity to carry out these works.

ii. The demand is based upon the fact that the Plaintiff failed to renew the Guarantee and not upon damage to the defendant's property,

iii. The bulk of the sum claimed as damages are in fact estimates of future loss and do not take into account the possibility that any damage may have been caused by the defendant's own substantial construction on Lot 97 itself with the erection of two large multi-storey building with attendant piling works.

[12] The crux of the issues raised by the Plaintiff is that the defendant had failed to follow the terms of the written agreement before a call is made.

[13] Even though the Letter of Guarantee appears to be an on-demand guarantee, the parties had agreed to be bound by the terms of the written agreement dated 29 May 1996.

[14] The terms of the agreement reproduced in extenso clearly provided that it is payable on demand *subject* to the conditions stated therein in the event of damage arising to the St. Anthony's Church and/or the School at Lot 97 as a result of such damage being caused by the execution of the construction works at the Plaza Rakyat Project.

[15] It was agreed, that in determining any damage caused to the abovementioned St. Anthony's Church and the School, as one of the criteria to judge the condition of the buildings before such damages are caused, is the Dilapidation Survey Report made by Toplis and Hardings (M) Sdn Bhd.

[16] The said Dilapidation Survey Report revealed the existence of cracks which predated the commencement of works by the Plaintiff. The report by the defendant's Consultant Reka Padu Sdn Bhd does not appear to distinguish between the existing cracks and the subsequent ones attributable to the Plaintiff's work. The Plaintiff contended that the failure

of the defendant in making reference to that report is itself tantamount to a breach of the agreement.

[17] Pertinent to this, is the failure of the defendant to give the Plaintiff an opportunity to agree on the cause of the damage.

[18] The defendant, however, contended that the Letter of Guarantee is an unconditional on-demand guarantee. There was no requirement placed on the defendant to agree to anything at all under the Guarantee.

[19] It is true that this is a written Guarantee, and in order to interpret the obligation of the bank, one needs to look at the written Guarantee itself to determine what are the terms and conditions of the Guarantee *(Teknik Cekap Sdn Bhd v Public Bank Bhd* [1995] 3 MLJ 449).

[20] In *Kerajaan Malaysia v South East Asia Insurance Bhd* [2000] 3 CLJ 705, the Federal Court said that an 'unconditional' or 'on demand' performance bond is one which is so drafted that the guarantor will become liable merely when the demand is made upon the guarantor by the proprietor with no necessity for the proprietor to prove any default by the principal in performance of the principal contract.

[21] I agree with the learned defendant's counsel that the Letter of Guarantee seen in isolation is payable on demand because of the presence of the no contestation clause, ie, 'notwithstanding any contestation or protest by the contractor or by the guarantor or by any third party.'

[22] The Plaintiff however contended further that the exercise of the guarantee by the defendant beneficiary is subject to the terms as agreed by the parties, in their letter to the defendant (Exhibit A-4). It was pursuant to those agreed terms that the Letter of Guarantee was issued and therefore any demand on the guarantee must be in compliance with the terms of that agreement.

[23] The defendant knew that the terms of the agreement bound both parties before a call on the guarantee could be made. The fact that the defendant attempted to vary the terms of the agreement as a condition for acceptance of the new guarantee which was rejected by the Plaintiff showed that the defendant knew that the call on the Letter of Guarantee is subject to those terms.

[24] Even if the defendant had shown through correspondence that the amount of damages of RM318,700 as at December 1999 was not objected to by the Plaintiff, the actual call here was for a sum of RM1,328,025 which amount was computed without regard to the terms and factors as agreed in the agreement (Exhibit A-4).

[25] These are clearly bona fide triable issues for this Court to decide as enumerated above. At this interlocutory stage of the proceedings, it is not the function of the Court to come to any specific findings of facts or conclusion. As long as it is not frivolous or vexatious these should be dealt with at the trial.

A *Balance of Convenience*

[26] In determining where the justice of the case lies, I am satisfied that the defendant will not suffer irreparable damage which could not be compensated by the undertaking for damages by the Plaintiff. Pending hearing, the amount is there with the bank and the interest of the defendant
B to the sum of RM1 million, if at all, is secured and the status quo is maintained.

[27] For the above reasons, I grant the interlocutory injunction with costs to be determined at conclusion of the action.

Judgment granted to the plaintiff.
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Reported by AG Kalidas

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